Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-851

SAMUEL G. ALBERT, M. D. and
FRED G. ALBERT, D.P.M.,

Petitioners,

v.

FIRST NATIONAL BANK AND TRUST
COMPANY OF MARQUETTE, MICHIGAN,
EXECUTOR OF THE ESTATE OF
GEORGE ALBERT, DECEASED,

Respondent.

REPLY BRIEF TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

SAMUEL G. ALBERT, M.D.
FRED G. ALBERT, D.P.M.
In Pro Per
Albert Building
105 Suffolk Street
Ironwood, Michigan 49938
(906) 932-3406

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Petitioners file this Reply Brief to the Brief filed by Respondent in Opposition to Petition for a Writ of Certiorari.

This Reply is made pursuant to and in compliance with Rule 24.4 of the Rules of the Supreme Court of the United States.

This Reply is deemed necessary by virtue of the deceptive and misleading contents of the Brief filed by the Respondent in Opposition to Petition for a Writ of Certiorari.

This Reply Brief is intended to be addressed to any Argument made by Respondent, wheresoever it appears in the Brief of Respondent, irrespective of its particular designated caption.

ARGUMENT

JURISDICTION

To Reply to what Respondent says under caption "Jurisdiction" (Resp. Brief p. 2) to the effect that jurisdictional requisites are not adequately set forth, Petitioners say that

compliance with Rule 23 appear from the Petition, pages 3 and 4, thereof.

The assertion of Respondent is oblivious of the very thrust of the Petition re: the matter of lack of jurisdiction emanating and evident in the inferior Courts, Probate Court, Circuit Court, Court of Appeals, and Supreme Court (State).

In any event, this Court percieves that if any inferior court has no jurisdiction of a cause, an appeal from its decision confers no jurisdiction on this Court of the merits, but the Court in such cases entertain an appeal for the purpose of revising a judgment or order for want of jurisdiction and this court is empowered to dismiss the case or direct its dismissal by the lower courts. It may also render a judgment for costs. This Court is not forclosed from assuming jurisdiction, in any event, to determine if the lower courts

had jurisdiction in the first instance. It is clear that this is provided by Article III, Paragraph 2, Clause 2 of the United States Constitution and under the authority of Mitchel v. Maurer, (Cal.) 55 S. Ct. 162, 293 U.S. 295, and Nashville, C & St. L. Ry. v. Wallace (Tenn.), 53 S. Ct. 345, 288 U.S. 249. The latter case, appropriately, noted that the Supreme Court will look to substance and not form.

STATEMENT OF FACTS

To reply and comment on Respondent's adoption of the facts of the case. This Court is told that Respondent accepts the Statement of Facts as noted in the decision of the Court of Appeals. (Appendix A of Petition, cited as 66 Mich. 252).

Petitioners state that for the purpose of determining whether a Writ of Certiorari issue the statement of facts elicited in the

Petition more fairly presents the facts without the facts being colored by extraneous matter which prefaces the facts with a statement of annoyance and cites other litigation. (See First Paragraph of Opinion of Court of Appeals, Appendix A of Petition). It is this opinion which is in issue ultimately. Petitioners seek a review of such opinion. This Petition contains facts from the record more amenable to a proper determination of the Petition. The statement of Petitioners stands as unrefuted. It is further contended that Respondent failing in the opportunity to refute, modify or amplify on the Petitioners facts has actually admitted that Petitioners statement is sufficient.

ARGUMENT

The Respondent asserts that jurisdiction was waived by Petitioners by not filing motion for accelerated judgment under GCR 116 and provides this court with the terms of the Court

Rule (Respondent's Appendix A). This attempt to delude and mislead the Court borders, if not actually constitutes, contumacious conduct. It is certainly consistent with the conduct complained of throughout. Counsel for Respondent knows that Petitioner filed Motions under GCR 116 (Accelerated Judgment) and GCR 117 (Summary Judgment) and that his motions received some consideration of the Circuit Court. Respondent's Appendix "D" indicates this fact. Additionally, the Circuit Court provided the guidelines and time limitations of said motions. This Court may note that Respondent's Appendix "C" not only proves that a Motion for Accelerated Judgment and Motion for Summary Judgment were filed on January 2, 1974, but the Circuit Court made a mere letter denial as petitioners are informed by Respondent's Appendix C. Petitioners had no knowledge of such letter. The Court awaited an opportunity to state reasons on the record. The Respondent lies

and attempts to delude by stating that the question of jurisdiction of the Circuit Court was never properly presented "below." Respondent, purposely, attempts to advise the Court that there was a waiver as to jurisdiction, well knowing the following facts:

(1) That the petition is not relegated to complaint over jurisdiction of person or property;

(2) That even if such waiver of complaint over jurisdiction of person or property existed as under GCR 116.2, such waiver is set aside by the Pre-Trial Summary (Respondent's Appendix D);

(3) That, in fact, Petitioners did file the Motion for Accelerated Judgment on January 2, 1974;

(4) That, in fact, the motion contained all of the jurisdictional objections: re: cause, subject matter (GCR 116.1(2); lack of capacity to sue (GCR 116.1(3); and other disability of suing party (GCR 116.1(5);

(5) That, in fact, the subject matter jurisdiction was presented and ruled upon as indicated by Respondent's Appendix C.

Respondent says on Page 2 of its Brief:

> "Under Michigan law, objection to jurisdiction is waived unless made in the responsive pleading on motion first filed GCR 1963, 116."

The Respondent continues to state that at no time did Petitioners "allege lack of jurisdiction in their Answer to the Circuit Court Complaint (Respondent's Appendix B).

In the first place, Respondent refuses to advise the Court, as clearly indicated in GCR 116.2, that the waiver, if any, of the defense of lack of jurisdiction as described by Respondent is jurisdiction "over the person or property." Respondent simply refers to "jurisdiction" intending to convince this Court by the general term "jurisdiction" that all defenses to or objections to jurisdiction were included in GCR 116.2 and more importantly, that Petitioner was subject to the waiver provisions improperly cited.

To support an argument of waiver, Respondent believes that the failure of Petitioners attorneys to incorporate an allegation of objection to jurisdiction in their answer, forecloses any subsequent allowance of interposing such objections by further pleadings, as motions, permitted by Pre-Trial Summary (Respondent's Brief, Appendix D, Page 15, under caption of "Pleadings"). GCR 1963, 301 grants the Court authority to amplify the pleading and to permit other motions to be disposed of before trial during a pre-trial conference.

The statement that the Complaints re: conversion and breach of fiduciary duty were properly brought by the Respondent does not reflect the law. This matter of capacity to sue is covered by Petitioners in subparagraph C of the Petition under Reasons for Granting Writ, pages 24-42. The Respondent had no discretion to exercise. The powers of an

executor are statutorily limited. The only provision provided by law for an executor to proceed in the matter of "conversion" is found and limited to Compiled Laws Supp. 1956, Sec. 705.5, MSA 27.3178(385). (Petition, pages 25, 26, and 29). Likewise, the Probate Court was limited to that procedure. The Respondent did not use the provided procedure. (Petition, page 25) and the Probate Court did not recognize the request for instructions by the executor as a complaint under the above quoted statute (Petition, pages 25-26).

Respondent wrongfully contends that no order was necessary for it to institute suit. This is the position the Respondent must take because there was no such Order. Also, it attempts to reconcile its promise on the record to prepare for entry an order for the Court's signature. (See Petition, page 40). All that is argued as reason for granting Writ

found on Pages 18-42, is applicable and provides adequate reply by reference.

The Respondent obtained the so-called instruction to proceed against Petitioners from determinations made by the Probate Judge who was biased and prejudiced and who did not provide Petitioners with a fair hearing.

Petitioner details showing of preservation of grounds:

A. Petitioners insisted upon a motion for Accelerated Judgment (GCR 116) at Pre-Trial Conference and as alluded to in Pre-Trial Order Summary (Appendix D, page 15 of Respondent's Brief in Opposition) on the grounds "that the Court (Circuit) lacks jurisdiction of the parties and subject matter and certain other grounds . . ." (Petitioners relied on the presentation of said motions and did not attend the in-chambers pre-trial conference).

B. Petitioners continued to insist on a motion for summary judgment because of the conclusionary nature of the Complaint, and Petitioners filed same in pro per on January 2, 1974, before trial, and on the same date, and in pro per (indicates petitioners insistance) filed a Motion for Accelerated Judgment and applied and preserved jurisdictional grounds relating to the jurisdiction of the Circuit Court. (Respondent Appendix C - Opinion of Gogebic County Circuit Court, pages 12-13).

C. The Circuit Court alludes to and makes a determination of the jurisdictional issue regarding the lack of a judgment and order in writing necessary to confer jurisdiction on the Circuit Court or the right of the executor to proceed without proper authority through Order of Judgment and/or capacity to sue. (Respondent's Appendix C, page 13).

D. The Circuit Court admits by confession in Appendix C - Opinion of Gogebic County Circuit Court, page 12, that Petitioners motions filed January 2, 1974, were determined to be denied without hearing and they had no knowledge of same until date of proceedings held on March 4, 1974. The Court in Appendix C, says:

> "There were three motions filed in this case and the Court has indicated by letter to counsel that all such motions would be denied and the letter stated that counsel would be informed of the reasons for such denial at the opening of the trial here today, the reasons to be stated on the record."

This is additional proof of the preservation of the issue.

E. The trial proceeded without entry of an Order of Denial of Petitioners Motions. Here the Court was not speaking through an Order or Judgment, but impermissably through a letter and an Opinion without argument.

F. That the proceedings of the Probate

Court showing patently on its face together with a noticed failure of Respondent to file and enter the prerequisite order were stipulated as a part of the record of the Circuit Court further evidences the preservation of the issue of jurisdiction. (Petitioners Appendix A, Findings of Fact and Conclusions of Law of the Circuit Court and Respondent's Appendix C, page 13).

G. Petitioners insistance that their Counsel reflect and preserve their jurisdictional and relate due process claims is evidenced in the Court of Appeals on Application for Rehearing after withdrawal of Petitioners' counsel and is contained in the filed and recorded correspondence between petitioners and their counsel and is a part of the record.

Petitioner says that the decisions rendered in the lower courts do not rest on

independent and adequate state grounds. The principle that this Court will decline to review in such cases does not apply because Petitioners contend that jurisdiction is lacking and that all that was undertaken and determined by the lower courts is a nullity.

The question of jurisdiction of the subject matter may be raised for the first time in the Supreme Court, or the Court may on its own motion, take notice of such want of jurisdiction. This Court takes notice of the want of jurisdiction when, as in the instant case, it is apparent on the face of the record. Twist v. Prairie Oil & Gas Co., Okl., 47 S. Ct. 755, 274 U.S. 684, U.S. v. Corrick, Ill., 56 S. Ct. 829, 298 U.S. 435; rehearing denied 56 S. Ct. 951, 298 U.S. 692.

It appears that Respondent's opposition is based on a procedural default of Petitioner because Petitioner failed to make a motion for

accelerated judgment under GCR 116 and by failing to preserve the federal grounds. Of course, Petitioners deny same. It appears that Respondent has cited Henry v. State of Mississippi, 379 U.S. 443, 85 S. Ct. 564, 567 (1965 without reading and/or properly interpreting plain words. The decisions of Henry is favorable to the contentions of Petitioner. Since the claim of Respondent relates to a default in compliance with a state procedural rule, Henry supports Petitioner in stating that the question of when and how defaults can preclude this Court's consideration of a federal question is itself a federal question. The Respondent does not distinguish between state substantive grounds and state procedural grounds. There is no state interest involved here. Such being the case, the state procedural rule, even if it applied, ought not be permitted to bar vindication of important federal rights.

Respondent has cited Black v. Cutter Laboratories, 351 U.S. 292, 100 L ed 1188, 76 S. Ct. 82.4, reh. den. 352 U.S. 859, 100 L ed 2d 69, 77 S. Ct. 21, but fails to apprise that a writ of certiorari was granted originally in 350 U.S. 816, 76 S. Ct. 51. True upon review after grant of certiorari the writ was dismissed by a divided court. Justice Douglas in dissent, joined by the Chief Justice and Justice Black, said:

> "I believe with all deference, that the decision of the Court (dismissing the Writ) abuses the rule that we will not undertake to review a decision of the State Court that rests on an independent state ground. No independent state ground is presented in this case...."

In the case of Jenkins v. Florida (1974) 96 S. Ct. 2750, 417 U.S. 815, where the question of the protection of rights under the 14th Amendment was involved which the appellee said was not before this Court because appellant did not raise it on his State Appeal.

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This Court on that issue said, page 2753:

> "But whether or not appellant argued his constitutional issue below, it is clear that the Supreme Court of Georgia reached and decided it ... That is sufficient under our practice."

The Court of Appeals after considering Petitioners' application in pro per for rehearing containing the constitutional issues and lack of jurisdiction contentions stated that it gave the application "due consideration."

There can be no question as to the proper presentation of a federal claim when the highest state court pases on it. In this case, the matter of jurisdiction was presented below, the federal questions were presented and considered thus Petitioners have satisfied the statutory requirement that the federal right sought to be vindicated in this Court be one claimed below 28 USC Sec. 1257(3).

CONCLUSION

This Court should grant a Writ of Certiorari and assume jurisdiction to determine the want of jurisdiction as same appears on the face of the records of the lower courts. This jurisdictional matter has not been waived. The record of the Circuit Court is a nullity. The Petitioner could not waive subject matter jurisdiction. The Circuit Court could not by judicial fiat or otherwise create its own jurisdiction. Any judgment by a court acting without jurisdiction is a nullity and may be so treated everywhere.

Respectfully submitted,

SAMUEL G. ALBERT, M.D.

FRED G. ALBERT, D.P.M.

Petitioners in Pro Per
Albert Building
105 Suffolk Street
Ironwood, Michigan 49938
(906) 932-3406

PROOF OF SERVICE

STATE OF MICHIGAN
SS.
COUNTY OF GOGEBIC

SAMUEL G. ALBERT, M.D., first being duly sworn, deposes and says that he is one of the petitioners, herein, and does certify that three (3) true and exact copies of the within and foregoing Reply Brief to Brief of Respondent in Opposition to Petition for a Writ of Certiorari, was served upon opposing counsel by placing same in the United States Mail with sufficient postage to insure delivery to STEPHEN F. ADAMINI, Esquire, 128 West Spring Street, Marquette, Michigan, 49855, Attorney for the Respondent.

Dated this 23 day of January, 1977.

Samuel G. Albert M.D.
SAMUEL G. ALBERT, M.D.

Subscribed and sworn to before me this 23rd day of January, 1977.

Bette J. Beber

Bette J. Beber
Notary Public, Gogebic County, Michigan.
My commission expires 1-8-1980.